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June 20, 2007

VIA ELECTRONIC FILING and
FIRST CLASS MAIL

Hon. Joseph F. Bianco
United States District Court
Eastern District of New York
100 Federal Plaza
Central Islip, New York 11722

Re: FragranceNet.com, Inc. v. FragranceX.com, Inc., CV-06-2225 (JFB) (AKT)

Dear Judge Bianco:

We are counsel to defendant FragranceX.com, Inc. We are writing in opposition to plaintiff's June 19 letter asking the Court to certify its June 12 Order for immediate appeal pursuant to 28 U.S.C. §1292(b).

There is no reason to certify this Order for immediate appeal. None of the bases under which such certifications are typically granted is present here and no saving of judicial resources could be anticipated from such a certification.

Certifications for immediate appeal to a circuit court are appropriate when there is a split of authority within a Circuit or where the issue is a novel issue of law worthy of immediate attention by an appellate court. *Klein v. Vision Lab Telecomms., Inc.*, 399 F. Supp. 2d 528, 537 (S.D.N.Y. 2005) (certification granted based on substantial ground for difference of opinion as demonstrated by fact that "two distinguished judges in our sister Eastern District…have reached opposite conclusions" on the issue); *Bond v. Doig*, 433 F. Supp. 243, 249 (D.N.J. 1977) (certification appropriate where two courts in the district reached opposite results and the court of appeals had not yet spoken on the issue); *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990) (interlocutory appeal may be granted if "the issues are difficult and of first impression"); *In re Currency Conversion Fee Antitrust Litig.*, 2005 WL 1871012, at *3 (S.D.N.Y. Aug. 9, 2005) ("An order may be certified for interlocutory appeal when the issues raised are novel and complex and where the practical effect of the order may be dispositive"). Neither is the case here.

The courts of the Second Circuit uniformly reject plaintiff's position. In the Second Circuit, the mechanical, unseen use of a trademark does not constitute a trademark use within the meaning of federal or state trademark or unfair competition law, as your Honor explained in your June 12th decision. The Second Circuit has given no indication that it would treat the mechanical uses of plaintiff's trade name asserted in this case any differently from the mechanical uses considered in the *1-800 Contacts* case.

By the same token, the question raised by plaintiff is not a novel one in this Circuit. This Court's decision in this case is the sixth one in the Circuit applying the aforesaid principle. The argument that plaintiff is making should be properly be directed to the Supreme Court, if there is still a split in the Circuits if and when this case reaches the Second Circuit in due course. It provides no basis for an immediate appeal to the Second Circuit.

Furthermore, there will be no judicial economy benefit from an immediate appeal. *See Koehler v. Bank of Bermuda Ltd.* 101 F.3d 863, 865-66 (2d Cir. 1996) ("The use of § 1292(b) is reserved for those cases where an intermediate appeal may avoid protracted litigation"); *Fogarazzo v. Lehman Bros., Inc.*, 2004 WL 1555136, at *2 (S.D.N.Y. July 9, 2004) (whether interlocutory appeal will "'materially advance the ultimate termination of th[is] lawsuit' is "the third – and most important – finding required by section 1292(b)" (citing *Lerner v. Millenco*, 23 F. Supp. 2d 345, 347 (S.D.N.Y. 1998))). There is no overlap between plaintiff's original claim and plaintiff's proposed new claims. Plaintiff's original claim involves only the alleged unconsented use on defendant's website of photographs in which plaintiff claims copyright. Plaintiff's proposed new claims have nothing to do with those photographs or defendant's website. They related exclusively to the alleged use of plaintiff's trade name to cause defendant's advertisement or internet address to appear in internet searches. The two sets of claims easily could have been brought in separate cases. There is little overlap in anticipated discovery between them. A determination of liability in this case will have no influence on the trademark and unfair competition claims that plaintiff now seeks to appeal.

For these reasons, we respectfully submit that there is no need for or benefit from an additional procedure in this case, namely, an immediate separate appeal, and the purposes of 28 U.S.C. §1292(b) would not be served by an immediate appeal.

Respectfully,

David Rabinowitz

DR:dr

cc: Robert L. Sherman, Esq. (via facsimile and first class mail)
Rebecca Myers, Esq. (via facsimile and first class mail)